Chia See Yin & Ors v Yeoh Kooi Imm

HIGH COURT (JOHOR BAHRU) — ORIGINATING SUMMONS NO 24–915–OF 1995
ABDUL MALIK ISHAK J
12 JANUARY 1996

Land Law *— Restraints on dealings — Caveats — Application for removal of caveats — Termination of sale and purchase agreement — Purchaser failed to pay balance purchase price within completion period — Vendor terminated contract and forfeited deposit — Purchaser lodged caveat subsequently — Whether purchaser had caveatable interest in land — National Land Code 1965 ss 323 & 327*

Land Law *— Restraints on dealings — Caveats — Application for removal of caveats — Whether onus of proof on caveator or registered owner of land*

Contract *— Sale and purchase of land — Delay in completion — Request by purchaser to extend completion date — Vendor refused and terminated contract — Time was essence of agreement — Whether any evidence to show waiver on part of vendor*

The plaintiffs were the registered proprietors of a piece of land ('the land'). By an agreement dated 6 January 1995 ('the agreement'), the plaintiffs agreed to sell a portion of the land to the defendant for RM718,000. The defendant paid a sum of RM71,800 as deposit and as part payment towards the purchase price. The completion date was agreed to be three months from the date of the agreement, ie 5 April 1995, with an extension of one month with interest at the rate of 10% per annum on the balance of the purchase price. It was also stipulated in the agreement that time was of essence of the agreement. On 18 April 1995, the defendant sought an extension of time, purportedly on the ground that the subject property would be acquired by the Drainage and Irrigation Department Johor. On 21 June 1995, the plaintiffs' solicitors rejected the defendant's request for extension of the date of completion beyond 5 May 1995, which was the extended completion date, and gave notice that the deposit of RM71,800 was thus forfeited by the plaintiffs. On 3 July 1995, the defendant lodged a private caveat against the whole portion of the land ('the first caveat'). However, the defendant withdrew it voluntarily two months later. On 21 September 1995, the defendant lodged another caveat ('the second caveat') on the land on the same ground as the first caveat, as well as a civil suit against the plaintiffs for specific performance. The defendant contended that time as the essence of the agreement had been waived, as the third plaintiff had on behalf of all the plaintiffs, agreed to the extension of the completion date on 20 April 1995. The plaintiffs denied the contention and filed an originating summons, inter alia, for the removal of the second caveat and damages for the wrongful entry of the caveat in this action.

Held, allowing the plaintiffs' application:

(1) Since the plaintiffs were the registered proprietors of the land, the onus of proof that the caveat should remain was on the

A defendant caveator (see p 502A); *Wong Kuan Tan v Gambut Development Sdn Bhd* [1984] 2 MLJ 113 followed.

(2) When the second caveat was lodged on 21 September 1995, the defendant had no caveatable interest on the land. The agreement which formed the basis of the defendant's claim or registrable B interest in the land was not valid or subsisting at the time of the lodgement of the second caveat because the agreement had been lawfully terminated by the plaintiffs on 21 June 1995 when the balance of the purchase price was not paid by 5 May 1995 (the extended completion date) (see pp 502I and 503A–B).

C (3) In the absence of the declaration in Form D as envisaged in s 8(3) of the Land Acquisition Act 1960, the conclusive evidence clause that the State Authority had decided that the land was needed for the purpose specified in s 8(1) thereof being final, conclusive and could not be questioned was thus missing in this case (see p 504D–F); *Wijeyesekera v Festing* 1919 AIR 155 D distinguished.

(4) The plaintiffs held the land as co-proprietors. There was no evidence at all to show that the third plaintiff was appointed as the spokesman for the other two proprietors of the land. Even assuming that the third plaintiff did give his consent on his own E behalf as well as on the behalf of the other co-proprietors, such consent has no force of law to bind the other co-proprietors of the land (see pp 504I and 505A).

(5) Throughout, the plaintiffs conducted themselves in such manner as to indicate to the world at large that they meant to make time F the essence of the agreement. The time was never waived and remained active throughout the whole episode (see p 506B–C); *Wong Kup Sing v Jeram Rubber Estates Ltd* [1969] 1 MLJ 245 and *Webb v Hughes* (1870) LR 10 Eq 281 distinguished.

(6) The notice given by the plaintiffs, though not a requirement G under the agreement, must be considered a proper and valid notice. Consequently, the plaintiffs were entitled to treat the agreement as null and void (see p 506I).

(7) There is no provision in the National Land Code 1965 ('the NLC') for the caveator to obtain an extension of his private H caveat beyond the original statutory period of six years specified in s 328 of the NLC. Accordingly, to ensure continued protection of his claim to an unregistered registrable interest in the land, the caveator will normally enter a second caveat. But here on the facts, the first caveat was removed voluntarily by the defendant barely two months after it was lodged and was followed by the I second caveat which was lodged on the same ground as the first caveat. Since the defendant had no caveatable interest at the time she lodged the second caveat, the second caveat amounted to an abuse of caveat procedure and this court must, in the circumstances, disallow its entry (see p 508D–F).

[Bahasa Malaysia summary

Plaintif-plaintif adalah tuan punya berdaftar sebidang tanah ('tanah itu'). Melalui suatu perjanjian bertarikh 6 Januari 1995 ('perjanjian tersebut'), plaintif-plaintif bersetuju menjual sebahagian tanah itu kepada defendan pada harga RM718,000. Defendan telah membayar jumlah sebanyak RM71,800 sebagai deposit dan bayaran sebahagian daripada harga belian. Tarikh penyempurnaan yang dipersetujui adalah tiga bulan dari tarikh perjanjian tersebut, iaitu 5 April 1995, dengan perlanjutan selama sebulan dengan faedah pada kadar 10% setahun atas baki harga belian. Adalah juga disyaratkan dalam perjanjian tersebut bahawa masa adalah inti pati perjanjian tersebut. Pada 18 April 1995, defendan meminta perlanjutan masa, kononnya atas alasan bahawa hartanah itu akan diambil oleh Jabatan Pengairan dan Saliran Negeri Johor. Pada 21 Jun 1995, peguamcara plaintif-plaintif telah menolak permintaan defendan untuk perlanjutan masa tarikh penyempurnaan melebihi 5 Mei 1995, yang merupakan tarikh penyempurnaan yang telah dilanjutkan, dan memberi notis bahawa deposit sebanyak RM71,800 telah dilucuthakkan oleh plaintif-plaintif. Pada 3 Julai 1995, defendan telah memasukkan satu kaveat sendirian terhadap seluruh bahagian tanah itu ('kaveat pertama'). Namun demikian, kaveat pertama ini telah ditarik balik oleh defendan secara sukarela dua bulan kemudian. Pada 21 September 1995, defendan memasukkan satu lagi kaveat ('kaveat kedua') atas tanah itu berdasarkan alasan yang sama seperti kaveat pertama, serta satu guaman sivil terhadap plaintif-plaintif untuk pelaksanaan spesifik. Defendan berhujah bahawa masa sebagai inti pati perjanjian tersebut telah diketepikan, oleh kerana plaintif ketiga telah bersetuju kepada perlanjutan tarikh penyempurnaan pada 20 April 1995 bagi kesemua plaintif. Plaintif-plaintif telah menafikan hujah itu dan memfailkan satu saman pemula, antara lain, untuk pembatalan kaveat kedua dan ganti rugi bagi kemasukan kaveat yang salah dalam tindakan ini.

Diputuskan, membenarkan permohonan:

(1) Oleh kerana plaintif-plaintif adalah tuan punya berdaftar tanah itu, beban membukti bahawa kaveat harus terletak pada defendan, iaitu pengkaveat (lihat ms 502A); *Wong Kuan Tan v Gambut Development Sdn Bhd* [1984] 2 MLJ 113 diikut.

(2) Apabila kaveat kedua dimasukkan pada 21 September 1995, defendan tidak mempunyai kepentingan boleh kaveat atas tanah itu. Perjanjian tersebut yang membentuk asas tuntutan atau kepentingan boleh daftar defendan tidak sah dan tidak wujud pada masa kaveat kedua dimasukkan sebab perjanjian tersebut telah ditamatkan secara sah oleh plaintif-plaintif pada 21 Jun 1995 apabila baki harga belian tidak dibayar oleh defendan pada 5 Mei 1995 (tarikh penyempurnaan yang dilanjutkan) (lihat ms 502I dan 503A–B).

(3) Dalam ketiadaan deklarasi dalam Borang D seperti yang dinyatakan oleh s 8(3) Akta Pengambilan Tanah 1960, fasal bukti kukuh bahawa pihak berkuasa negeri telah memutuskan bahawa tanah itu dikehendaki untuk tujuan ditetapkan dalam s 8(1) adalah muktamad, tidak dapat dipertikaikan dan tidak boleh disoal, tidak terdapat dalam kes ini (lihat ms 504D–F); *Wijeyesekera v Festing* 1919 AIR 155 dibeza.

(4) Notis yang diberikan oleh plaintif-plaintif, walaupun bukan satu keperluan di bawah fasal 12 perjanjian tersebut, mestilah diambil kira sebagai notis yang wajar dan sah. Ekoran itu, plaintif-plaintif berhak menganggap perjanjian tersebut batal dan tak sah (lihat ms 504I dan 505A).

(5) Sepanjang masa, plaintif-plaintif telah berkelakuan dalam cara yang menunjuk kepada sejagat dunia bahawa mereka berniat menjadikan masa inti pati perjanjian tersebut. Masa sememangnya tidak pernah diketepikan dan tetap aktif sepanjang peristiwa itu (lihat ms 506B–C); *Wong Kup Sing v Jeram Rubber Estates Ltd* [1969] 1 MLJ 245 dan *Webb v Hughes* (1870) LR 10 Eq 281 dibeza.

(6) Notis yang diberi oleh plaintif-plaintif, walaupun bukan satu keperluan di bawah perjanjian tersebut, mesti dianggap sebagai suatu notis yang betul dan sah. Lantaran itu, plaintif-plaintif berhak menganggap perjanjian tersebut tak sah dan terbatal (lihat ms 506I).

(7) Tidak terdapat peruntukan dalam Kanun Tanah Negara 1965 ('KTN') bagi pengkaveat memperolehi perlanjutan kaveat sendirian melebihi tempoh statutori asal selama enam tahun seperti yang ditetapkan dalam s 328 KTN. Ekoran itu, bagi memastikan perlindungan yang berterusan tuntutannya ke atas kepentingan boleh daftar yang tidak didaftar dalam tanah, pengkaveat biasanya akan memasukkan kaveat kedua. Tetapi berdasarkan fakta di sini, kaveat pertama telah dibatalkan secara sukarela oleh defendan dua bulan selepas ia dimasukkan diikuti oleh kaveat kedua yang dimasukkan atas alasan yang sama seperti kaveat pertama. Oleh kerana defendan tidak mempunyai kepentingan boleh kaveat pada masa dia memasukkan kaveat kedua, kemasukan kaveat kedua merupakan suatu penyalahgunaan prosedur kaveat dan mahkamah ini mestilah, dalam keadaan begini, melarang kemasukannya (lihat ms 508D–F).]

Notes

For cases on caveats, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 2241–2428.

For cases on the sale and purchase of land, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2063–2136.

Cases referred to

Damodaran v Vasudeva [1974] 1 MLJ 128
Eastham (Inspector of Taxes) v Leigh London and Provincial Properties Ltd [1971] 1 Ch 871
Hiap Yiak Trading Sdn Bhd & Ors v Hong Soon Seng Sdn Bhd [1990] 2 MLJ 155
Hock Hin Bros Sdn Bhd v Low Yat Holdings Sdn Bhd [1984] 1 MLJ 92
Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor [1995] 1 MLJ 719
Murugappa Chettiar Lakshmanan v Lee Teck Mook [1995] 1 MLJ 782
National Land Finance Co-operative Society Ltd v Sharidal Sdn Bhd [1983] 2 MLJ 211
Property and Bloodstock Ltd v Emerton [1967] 2 All ER 839
Sim Chio Huat v Wong Ted Fui [1983] 1 MLJ 151
Stocks & Holdings (Imperial Arcade) Ltd v Fink [1965] NSWR 504
Thevathason v Kwong Joon [1990] 3 MLJ 49
Trans Trust SPRL v Danubian Trading Co Ltd [1952] 1 All ER 970
Webb v Hughes (1870) LR 10 Eq 281
Wijeyesekera v Festing (1919) AIR 155
Wong Kuan Tan v Gambut Development Sdn Bhd [1984] 2 MLJ 113
Wong Kup Sing v Jeram Rubber Estates Ltd [1969] 1 MLJ 245

Legislation referred to

Land Acquisition Act 1960 ss 8(1), (3)
National Land Code 1965 ss 326(2), (3), 327(1), 328, 329(2)

AG Danaraj (*Gana Muthusamy & Co*) for the plaintiffs.
Hong Chin Heng (*Gulam & Wong*) for the defendant.

Abdul Malik Ishak J: This was an application by the plaintiffs in encl 3 for the following prayers:

(1) that the private caveat lodged by the defendant on 21 September 1995 vide Presentation No 1953/95, Jilid 17, Folio 191 on the land known as EMR 1450, Lot 1948 in the Mukim of Plentong, Johor ('the land') be removed;

(2) damages for the wrongful entry of the caveat to be assessed by the senior assistant registrar;

(3) an interlocutory injunction to restrain the defendant from entering any further caveats;

(4) any further order or relief as the court may deem fit and proper; and

(5) costs to be borne by the defendant and payable to the plaintiffs.

The facts garnered from the affidavits filed by the parties thereto can be stated thus.

A The plaintiffs are the registered proprietors of the land measuring 8 acres 1 rood 9 poles. By an agreement dated 6 January 1995, the plaintiffs agreed to sell a portion of the land measuring three acres, delineated in the plan annexed to the agreement, at RM718,000. Certain terms were expressed in the agreement and these included:

B (a) that the sum of RM71,800 paid by the defendant shall be construed as a deposit and as part payment towards the purchase price.

(b) that the completion date shall be three months from the date of the agreement with a provision for extension of time by a further period of one month with interest at the rate of 10% per annum on the C balance of the purchase price.

(c) that the defendant will undertake to secure the issuance of the new individual titles categorized under industry in accordance with the plan annexed thereto on or before 31 October 1995 at her own costs and expense together with the other expenses incidental thereto (as reflected in cl 2 of the special conditions to the agreement).

D

(d) in the event the defendant failed to secure the issuance of new individual titles to the land, the plaintiffs shall be entitled to forfeit a sum equivalent to 15% of the purchase price absolutely and thereafter the agreement shall be terminated and be of no effect (this appears in cl 3 of the special conditions to the agreement).

E (e) the defendant will agree to reimburse the plaintiffs for the defendant's portion of premiums paid to the land office by payment of a D & C cheque No 006407 dated 23 December 1994 for RM56,250 in favour of Messrs Lee Chai Eng Haris & Co, as stakeholder to be paid to the plaintiffs, in the event the said cheque was dishonoured upon F presentation the plaintiffs shall be entitled to forfeit the 10% purchase price absolutely and terminate the agreement (cl 4 of the special conditions).

(f) that 'time wherever mentioned shall be of the essence of this agreement' (cl 15 of the agreement).

G Looking at the agreement, it is the duty of this court to determine whether the conditions as enumerated above affect the formation of the contract of sale of three acres out of the whole portion of the land so as to render the contract conditional or whether it is merely a term of the contract (see the approaches adopted by Ungoed-Thomas J in *Property and Bloodstock Ltd v* H *Emerton* [1967] 2 All ER 839 and that of Danckwerts LJ in the Court of Appeal [1968] 1 Ch 94 at pp 112 and 118). Buckley LJ in *Eastham (Inspector of Taxes) v Leigh London and Provincial Properties Ltd* [1971] 1 Ch 871 distinguished these two types of conditions as (at p 891):

> I That is not, in my judgment, a condition precedent to the contract at all, it is part of the terms of the contract. You may call it a condition if you please, but it does not make it a condition precedent to the existence of a contract, it merely indicates what is part of the terms of the bargain, just as in all contracts for sale the terms of the bargain are customarily described as conditions of sale.

Denning LJ in *Trans Trust SPRL v Danubian Trading Co Ltd* [1952] 1 All ER 970 on the same subject matter put it rather well and this was what his Lordship said (at p 976): A

> Sometimes it is a condition precedent to the formation of a contract, that is, it is a condition which must be fulfilled before any contract is concluded at all. In those cases the stipulation 'subject to the opening of a letter of credit' is rather like a stipulation 'subject to contract'. If no credit is provided, there is no contract between the parties. In other cases a contract is concluded and the stipulation for a credit is a condition which is an essential term of the contract. In those cases the provision of the credit is a condition precedent, not to the formation of a contract, but to the obligation of the seller to deliver the goods. If the buyer fails to provide the credit, the seller can treat himself as discharged from any further performance of the contract and can sue the buyer for damages for not providing the credit.

Back home in Malaysia, Salleh Abas CJ (Malaya) (as he then was) in the Federal Court case of *National Land Finance Co-operative Society Ltd v Sharidal Sdn Bhd* [1983] 2 MLJ 211 differentiated these two types of conditions in the following terms (at p 219):

> A contingent condition, as we have already referred it, is a provision in a contract to the effect that the contract shall not take effect unless and until the condition is fulfilled, and the non-fulfilment of the condition does not render either party liable in damages to the other; whilst a promissory condition, on the other hand, is an essential term of the contract, the breach of which entitles the innocent party to break itself as discharged from the contract and to sue for damages.

In my view, on the authorities, it is a correct statement of the law to say that a condition which affects the formation of a contract of sale, as in a conditional contract is therefore referred to as a contingent condition whereas one which relates to the performance of a term of a contract is described as a promissory condition (Chitty on *Contracts General Principles*, vol 1, 25th Ed at para 752). Clearly, therefore, the conditions attached to the agreement in the present case are contingent conditions and I so hold accordingly. Reverting back to the mainstream of the case, the facts will now be continued and be stated thus.

Since the agreement was dated 6 January 1995, the completion date (on the basis of three months' calculation from the date of the agreement) falls on 5 April 1995. But on 18 April 1995, the defendant sought an extension of time purportedly on the grounds that the subject property would be acquired by the Drainage and Irrigation Department ('the DID'). Through Messrs R K Menon & Co, the defendant sought to show by letter addressed to Messrs Lee Chai Eng & Co dated 18 April 1995 at paras 5 and 6 thereof that:

> It has now transpired that the Drainage and Irrigation Department Johor, wishes to acquire a part of the land concerned to accommodate the existing stream that flows within the said parcel of land.
>
> Our client (the defendant) does not, at this point in time know the exact area that the DID wishes to acquire. For that matter, the area

A acquired might or might not be substantial. Our client has, in fact, been told of the intended acquisition by a very senior officer in DID ie one Mr Bala and in the circumstances, our client is in the process of negotiating with the DID the exact area that is to be acquired. To date this has not been finalized.

B On 21 June 1995, the plaintiffs' solicitors took the necessary steps and:

(a) rejected the defendant's request for an extension of the date of completion beyond 5 May 1995.

(b) notified the defendant to the effect that the alleged intended acquisition by the DID was outside the purview of the Land Acquisition Act 1960.

C (c) gave notice that as a result of the breach of the essential term of the agreement, the sum of RM71,800 was forfeited.

(d) refunded the sum of RM56,250 being the contribution made by the defendant in regard to the premiums imposed by the land office.

On 3 July 1995, the defendant lodged a private caveat against the whole D portion of the land ('first caveat') and this prompted the plaintiffs to file an Originating Summons No 24–661–1995 to have the first caveat removed. On 12 September 1995, approximately two weeks before the hearing of Originating Summons No 24–661–1995, the defendant's solicitors informed the plaintiffs' solicitors that the defendant would be withdrawing the first caveat. This piece of startling information made the plaintiffs withdraw the E Originating Summons No 24–661–1995 which was, in due course, done subject to the defendant paying the necessary costs.

On 21 September 1995, the defendant filed another caveat ('second caveat') on the land on precisely the same grounds as the first caveat. The defendant also took a drastic measure by filing a civil suit in the Johor F Bahru High Court vide Civil Suit No 22–197–1995 for specific performance of the agreement. It was the defendant's contention that sometime on 20 April 1995, her agent personally met the third plaintiff to discuss the issue of the intended acquisition by the DID and to seek the consent of the third plaintiff who was allegedly acting on behalf of himself and the other G plaintiffs for an extension of the completion date. It was also the defendant's contention that the third plaintiff on behalf of himself and the other plaintiffs agreed to the extension. The plaintiffs vehemently denied these contentions. While the third plaintiff admitted that the defendant's agent met him in his office on 20 April 1995, yet the third plaintiff denied that he agreed to grant any extension of time although requested for by the H defendant's agent. It is germane to mention here that the defendant's agent is an undischarged bankrupt by the name of Chua Lai Seng with an exceedingly huge liability to the tune exceeding RM5,000,000 and the Official Assignee confirmed that he cannot be traced. In the course of the submission, it transpired that Chua Lai Seng was an advocate and solicitor I who had the misfortune of being struck off the roll and he is currently said to be in Johor Bahru.

I now propose to discuss the several issues that have cropped up in the present case.

Has the defendant a caveatable interest?

Since the plaintiffs are the registered proprietors of the land, the onus of proof that the caveat should remain lies on the defendant caveator. In this regard, reference may be made to the case of *Wong Kuan Tan v Gambut Development Sdn Bhd* [1984] 2 MLJ 113 (FC), where Hashim Yeop Sani FJ (as he then was) in explaining the nature of the onus said (at p 115):

> If an applicant is the registered proprietor of the land he need only show that he is the registered proprietor. His registered title is prima facie evidence of his unfettered right to deal with the land as he pleases. It is then for the caveator to satisfy the court that there are sufficient grounds in fact and in law for the caveat to be extended. The caveator must satisfy the court that on the evidence presented his claim to an interest in the land raises a serious question to be tried and having done so he must go on to show that on the balance of convenience it would be better to maintain the status quo until the trial of the main action.

His Lordship Hashim Yeop Sani FCJ (as he then was) proceeded further to say that (at the same page):

> To put it more simply, the caveator in this case must first satisfy the court that he has a 'caveatable interest' in the land. Only if he has such an interest can he qualify to lodge a caveat under s 323 of the National Land Code.

Recently, the Court of Appeal in *Murugappa Chettiar Lakshmanan v Lee Teck Mook* [1995] 1 MLJ 782 adopted the principles as enunciated in *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor* [1995] 1 MLJ 719 in an application for removal of caveat under s 327 (1) of the National Land Code 1965 ('the NLC'). Gopal Sri Ram JCA, delivering the judgment of the Court of Appeal in *Murugappa Chettiar Lakshmanan,* had this to say (at pp 788–789):

> First, whether the respondent, on the material set out by him in his application under s 323(1) of the Code, has disclosed a caveatable interest. Secondly, if he has established a caveatable interest, then, whether the evidence he produced before the learned judicial commissioner in support of his claim to that caveatable interest discloses a serious question to be tried. Lastly, if the first two questions are resolved in the respondent's favour, then, whether the balance of convenience, or more appropriately, the balance of justice, lies in favour of the caveat remaining on the register pending the disposal of his suit.

In another part of his judgment, his Lordship Gopal Sri Ram JCA said (at pp 789–790):

> Until and unless a purchaser has an enforceable contract for the sale of land, he can lay no claim to the title to registered land. A fortiori, he has no interest that is capable of protection by the entry of a caveat. As we have said, the application for the entry of the caveat in the instant case contains no assertion of a concluded contract.

It is my judgment that when the second caveat was lodged on 21 September 1995, the defendant had no caveatable interest on the land for the following salient reasons:

(a) the agreement which formed the basis of the defendant's claim or registrable interest in the land was not valid or subsisting at the time of the lodgement of the second caveat because the agreement had been lawfully terminated by the plaintiffs on 21 June 1995 when the balance of the purchase price had not been paid by 5 May 1995 (the extended completion date).

(b) the defendant has not fulfilled her obligations by 5 May 1995 or at any time thereafter. The defendant seems unwilling to perform her side of the contract and desires to make a substantial modification so as to amount to a new contract. The defendant seems to blame the DID for the intended acquisition of the land but surprisingly in encl 6 of exh YKI 3 the purported acquisition was entirely based on the letter dated 18 May 1995 by one Balasingam. For convenience, that letter is reproduced hereinunder:

JABATAN PENGAIRAN DAN SALIRAN NEGERI JOHOR
ARAS 3, BANGUNAN SULTAN IBRAHIM
KARUNG BERKUNCI 712
80990 JOHOR BAHRU

Ruj Tuan : LSS 10/93/3
Ruj Kami : JPSJ 203/1/3 (71) (13)

Tarikh : 18 Mei 1995

Tetuan Jurukur Berlesen
Lee Swee Siang
27A, Jalan Kuning Satu, Taman Pelangi
80400 Johor Bahru

PERMOHONAN PECAH SEMPADAN TANAH LOT 1948
EMR 1405 MUKIM PLENTONG KERANA PERUSAHAAN
OLEH ENCIK CHIA SEE YIN & RAKAN-RAKAN

Berhubung dengan perkara di atas, setelah lawatan tapak serta semakan dibuat, simpanan JPS selebar 20 meter (1 rantai) hendaklah diuntukkan dari tebing cabang Sungai Tiram yang mengalir melalui lot tersebut. Sila kemukakan pelan permohonan baru yang telah diuntukan simpanan JPS tersebut.
'Berkhidmat Untuk Negara'

—(Sgd)—
(IR Balasingam A/L CK Velu)
b/p Pengarah Pengairan dan Saliran Negeri Johor

BV/mss

sk Pentadbir Tanah Johor Bahru
Ruj (4) dlm (PT) 2/95

It is a sad observation to make that the name of Mr Bala as adverted to by Messrs RK Menon & Co in the letter dated 18 April 1995 is none other than IR Balasingam a/l CK Velu, the writer of the above-mentioned letter. It must be noted that Mr Bala had revealed the intended acquisition to the defendant as adverted to by Messrs RK Menon & Co, even on 18 April 1995. If it is true as alleged by Messrs RK Menon & Co, this state of affairs should stop. Government officers must be tight-lipped about government matters. Be that as it may, two initial observations must be made in regard to this letter. Firstly, it was not addressed to the plaintiffs or to the defendant; instead it was addressed to the third party. Secondly, it was not a declaration in the prescribed form published in the *Gazette* as required under the provisions of the Land Acquisition Act 1960. In fact, no gazette in regard to the purported acquisition of the land was ever exhibited by the defendant. In the absence of the declaration in Form D as envisaged in s 8(3) of the Land Acquisition Act 1960, the conclusive evidence clause that the decision of the State Authority that the land is needed for the purpose specified in s 8(1) thereof being final, conclusive and cannot be questioned is thus found wanting and missing here. In the circumstances, the decision of the Privy Council in *Wijeyesekera v Festing* 1919 AIR 155 (PC) cannot be applied to the facts of the present case.

(c) it was argued that since the agreement gave the defendant the right to lodge the second caveat, that agreement becomes the catalyst that would give the defendant a caveatable interest to the land. However, when the agreement was terminated on 21 June 1995, the defendant had no leg to stand onto and, consequently, she had no registrable interest to the land to enable her to lodge the second caveat on the land. As Chang Min Tat FJ (as he then was) said in *Paramount Limestone v Nader Minerals* [1979] 1 MLJ 90, especially at p 92:

> On the evidence before me, the right of the respondents sprang from the agreement of 9 October 1975, which had not been extended. Even if it had not been determined effectively by valid notice on 1 March 1976, it had now been determined by effluxion of time. The respondents can have no title or registrable interest to the land under such an expired agreement.

(d) reverting back to the question of the purported acquisition of the land, if indeed there was such an eventuality as the defendant sought to say, then agreement would come to an end. This is clearly spelt out in cl 16 of the agreement.

Whether time, as the essence of the agreement, has been waived by the plaintiffs

This is indeed an important and pivotal issue to the whole case. For fear of repetition it was sought to argue that the third plaintiff had, on 20 April 1995, consented to the defendant's agent's request for an extension of the date of completion on behalf of himself as well as the other plaintiffs. The defendant further contended that as a result of that consent, time as the essence of the agreement had been waived. One must not lose sight of the fact that all the plaintiffs held the land as co-proprietors. There was no evidence at all to show that the third plaintiff was appointed as the

spokesman for the other two co-proprietors of the land. Even assuming that the third plaintiff did give his consent on his own behalf as well as on behalf of the other co-proprietors, such consent has no force of law to bind the other co-proprietors of the land. Now, for the sake of argument, even assuming that there was such a discussion between the third plaintiff and the defendant's agent for an extension of the date of completion, at best such a discussion was made in the course of negotiating towards a contract collateral to the agreement. One must not forget that negotiations for a contract, no matter how advanced, cannot amount to a contract.

There are three situations wherein time can be said to be the essence of the contract:

(a) Where the contract expressly stipulates that time shall be the essence of the contract. This basic statement of the law can be distilled from the following cases: *Steedman v Drinkle & Anor* [1916] 1 AC 275; *Brickles v Snell* [1916] 2 AC 599; *Mussen v Van Diemen's Land Co* [1938] 1 Ch 253 and *Harold Wood Brick Co Ltd v Ferris* [1935] 2 KB 198.

(b) Where time was not incorporated as the essence of the contract but in due course it has been made as part and parcel of the contract by one party giving a notice to the other. That notice can only be given after the party has been guilty of unreasonable delay and it follows, as the night the day, that the time mentioned in the notice must be reasonable: *Green v Sevin* (1879–80) 13 Ch D 589; *Compton v Bagley* [1892] 1 Ch 313; *Stickney v Keeble* (1915) AC 386; *Smith v Hamilton & Anor* [1951] Ch 174 and *Re Barr's Contract* [1956] 1 Ch 551. Authorities show that what is reasonable is a question of fact, and like the case of *Ajit v Sammy* [1967] AC 255, six days may be said to be reasonable.

(c) where from the nature of the contract, time may be said to be the essence of the contract. Example of these kind of contracts are abound. By way of examples reference may be made to mercantile contracts (*Reuter v Sala* (1879) 4 CPD 239 at p 249), contracts for the sale of leaseholds (*Hudson v Temple* (1860) 29 Beav 536 at 543), an option to buy shares which fluctuate in value (*Hare v Nicoll* [1966] 2 QB 130), a colliery business (*MacBryde v Weekes* (1856) 22 Beav 533) and a public house as a going concern (*Lock v Bell* [1931] 1 Ch 35).

The question to ask is this: whether the conduct of the third plaintiff in meeting the defendant's agent as stated earlier would amount, in law, as a waiver that time should no longer be the essence of the contract? The facts in the present case are unlike that of *Wong Kup Sing v Jeram Rubber Estates Ltd* [1969] 1 MLJ 245, where Raja Azlan Shah J (as he then was) held that 'once time for completion was allowed to pass and parties went on negotiating time was no longer of the essence of the contract ... .' It is my judgment that time, in the present case, remains the essence of the contract from the beginning to the end. If the allegation by the defendant was indeed true that

time had been extended by the negotiations between the third plaintiff and the defendant's agent, why then did the plaintiffs reject the defendant's request for an extension of the date of completion beyond 5 May 1995! Why then did the plaintiffs give notice that as a result of the breach of the essential term of the agreement, the sum of RM71,800 was forfeited? Throughout, the plaintiffs conducted themselves in such a manner as to indicate to the world at large that they meant to make time the essence of the agreement. It is also my judgment that time was never waived and remained active throughout the whole episode. The present case is unlike that of *Webb v Hughes* (1870) LR 10 Eq 281 at p 286, where Sir R Malins VC observed:

> But if time be made the essence of the contract, that may be waived by the conduct of the purchaser; and if the time is once allowed to pass, and the parties go on negotiating for completion of the purchase, then time is no longer of the essence of the contract. But, on the other hand, it must be borne in mind that a purchaser is not bound to wait an indefinite time; and if he finds, while the negotiations are going on, that a long time will elapse before the contract can be completed, he may in a reasonable manner give notice to the vendor and fix a period at which the business is to be terminated.

See also the observations of Salleh Abas FJ (as he then was) in *Sim Chio Huat v Wong Ted Fui* [1983] 1 MLJ 151 (FC) at p 153.

Whether proper notice is required to terminate the agreement and forfeit the sum of RM71,800

Clause 12 of the agreement is worded in this fashion:

> In the event of the purchaser (referring to the defendant) failing, refusing and/or neglecting to pay the balance (of the) purchase price on the date of completion a sum equivalent to ten per centum (10%) of the purchase price shall be forfeited by the vendor (referring to the plaintiffs) forthwith without any further notice and balance of the moneys received by the vendor (referring to the plaintiffs) shall be refunded to the purchaser (referring to the defendant) forthwith without interest whereupon this agreement shall be treated as null and void and of no further effect and neither party shall have any claim whatsoever against the other.

On 5 May 1995, the defendant failed to pay the balance of the purchase price to the plaintiffs and when the plaintiffs forthwith forfeited RM71,800 being ten per centum of the purchase price after issuing a notice dated 21 June 1995 to the defendant's solicitor, that notice though not a requirement under cl 12 of the agreement must in my judgment be considered a proper and valid notice and it is also my judgment that when the plaintiffs returned RM56,250 to the defendant being the defendant's contribution for the land conversion premiums without interest on the same letter dated 21 June 1995, the plaintiffs had complied with that part of the requirement of cl 12 of the agreement. Consequently, the plaintiffs were entitled to treat and they did treat the agreement as null and void.

Whether the second caveat is valid and proper

The Registrar of Titles under s 329(2) of the NLC shall not entertain any application for the entry of a further caveat in respect of the same land in three circumstances:

(a) where the court has ordered the removal of an earlier private caveat under s 327 of the NLC; or

(b) where the court has refused an application under s 326(2) of the NLC for an extension of time with respect to such a caveat; or

(c) where the Registrar of Titles has removed the earlier private caveat pursuant to s 326(3) of the NLC.

All the authorities show that the three circumstances as enumerated above are not exhaustive and the courts have held that second caveats to be good in law and should be allowed to continue until the disposal of the main suit, on the one hand, and the courts too have held to the contrary that where the entry of the second caveats were made mala fides it would be struck down as being an abuse of the caveat procedure.

In *Damodaran v Vasudeva* [1974] 1 MLJ 128, Syed Agil Barakbah J (as he then was) said (at pp 129–130):

> The provisions of s 329(2) require scrutiny. It disallows the registrar to entertain any application for the entry of a further caveat if it is based on the like claim as that on which the former was based in cases where the court has ordered the removal of the former or has turned down an application for extension of time. The subsection may be construed as to enable another caveat to be entered provided it is based on different grounds from the former and after the former caveat has ceased to exist. In other words, it is not a renewal, revival or continuance of the former; it speaks of an entirely separate caveat distinct from the other. In the light of the above, and construing the relevant provisions of the Code as a whole as regards the subject, the only natural and logical construction that can be given by way of analogy is that they do not envisage the issue of a caveat when one is still in existence and the more so, on the same grounds. To construe otherwise will contravene the real intention of Parliament and tend to oust the jurisdiction and power of the court under s 326 which arise in this case. If the law is allowed to be circumvented by recognizing the second caveat the result will undoubtedly be an overlapping of caveats on the same land, on the same ground and by the same caveator.

Damodaran's case seems to follow the Australian trend as envisaged in *Stocks & Holdings (Imperial Arcade) Ltd v Fink* [1965] NSWR 504, where the Australian courts would intervene by way of an injunction in cases where the caveat procedure was abused by the entry of not only vexatious but successive caveats which cannot be sustained.

In *Hiap Yiak Trading Sdn Bhd & Ors v Hong Soon Seng Sdn Bhd* [1990] 2 MLJ 155, Richard Talalla JC (as he then was) followed the decision of Edgar Joseph Jr J (now FCJ) in *Hock Hin Bros Sdn Bhd v Low*

Yat Holdings Sdn Bhd [1984] 1 MLJ 92 and held, in dismissing the appeal, that the caveat ought to remain as the defendants had succeeded in showing that their claim to the land raised a serious question to be tried. It was further held that the fact that the defendants had entered an earlier caveat which they subsequently withdrew voluntarily did not prevent them from entering a second caveat.

In *Thevathason v Kwong Joon* [1990] 3 MLJ 49, LC Vohrah J (as he then was) said (at p 51):

> I did not think that both these authorities (*KI Muhiudeen Rawther v KEP Abdul Kassim & Ors* [1959] MLJ 257 and *Lim Kiat Moy v Hamzah* [1966] 2 MLJ 175) which were cited in *Damodaran v Vasudeva* [1974] 1 MLJ 128 to support the proposition that a second caveat may not be entered at the instance of the same applicant in respect of the same land and on precisely the same grounds under the National Land Code in any way prohibited the entering of a fresh caveat even after the *lapse* of the first caveat based on a different ground or even on the same grounds if it is for the bona fide purpose of protecting the caveator's interest in respect of the same land.

It is germane to mention that there is no provision in the NLC for the caveator to obtain an extension of his private caveat beyond the original statutory period of six years specified in s 328 of the NLC. Accordingly, to ensure continued protection of his claim to an unregistered registrable interest in the land, the caveator will normally enter a second caveat. But here on the facts, the first caveat was removed voluntarily by the defendant barely two months after it was lodged and this was followed by the second caveat which was lodged on the same grounds as the first caveat. Since I have held that the defendant had no caveatable interest at the time she lodged the second caveat for the reasons set out in the early part of this judgment, it is my considered view that the second caveat amounts to an abuse of the caveat procedure and this court must, in the circumstances, disallow its entry.

For the reasons adumbrated above, I allowed prayers (1), (2), (3) and (5) of encl 3.

Application allowed.

Reported by Tee Boon Cheong